FILED

No. [illegible] 24

# In the Supreme Court of the United States

OCTOBER TERM, 1934

MABOR K. McPEEK, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

# In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 876

NANCY K. McFEELY, PETITIONER

*v.*

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT*

## MEMORANDUM FOR THE RESPONDENT

We do not oppose the granting of a writ of certiorari in this case.

The petitioner became the owner of 1,000 shares of Radio A common stock which she acquired as the result of a gift from her mother, Martha A. Given. Mrs. Given's husband, T. H. Given, died in 1919, and no provision having been made in his will for her, she elected to take one-half of his estate, pursuant to the law of Pennsylvania, in lieu of dower. In 1924 she made an assignment in trust for the petitioner of ten percent of her undistributed one-

half interest in her husband's estate, and in 1925 this gift was made absolute. In 1925, the executors of T. H. Given filed a partial account in the Orphans' Court and a partial distribution of the assets was decreed, under the terms of which the petitioner received certain stocks in trust which are of no immediate concern. On November 3, 1927, following a further decree of distribution, the petitioner received directly from the executors 1,000 shares of Radio A common stock. On March 14, 1929, the petitioner sold this latter stock, which had been valued for gift-tax purposes as of June 23, 1924, at $20,625, for $484,460, reporting a net gain of $463,835 in her return for 1929. In determining petitioner's tax liability for 1929, the Commissioner took the value of Radio stock as of November 3, 1927, the date of distribution, as the basis for computing gain, and showed a resulting gain of $404,085 instead of $463,835. The petitioner did not question the Commissioner's valuation of the stock.

The sale was less than two years from the time of the distribution and delivery of the stock to the taxpayer, and the Commissioner held this date, November 3, 1927, controlling in his determination that the profit did not fall within the capital net gain provision of Section 101 (a) of the Revenue Act of 1928 (*infra*, p. 6) and constituted ordinary net income. His position was upheld by the Board of Tax Appeals and the Circuit Court of Appeals.

While we think the conclusion reached by the court below is correct, we do not feel warranted in opposing the petition. The petitioner urges that the decision is in conflict with the decisions of the Circuit Court of Appeals for the First Circuit in *The First National Bank of Boston* v. *United States* and *Lee* v. *Commissioner,* both decided March 9, 1935, and not yet reported but found in C. C. H., 1935, Vol. 3, pars. 9214 and 9215, respectively. The Government intends to apply to this Court for writs of certiorari in those cases. The court there decided that a residuary legatee receiving personal property upon distribution of a decedent's estate should be deemed to have held such property from the date of the decedent's death for the purpose of determining the holding period under the provisions of Section 101 (c) (8) of the Revenue Act of 1928 (*infra,* p. 6).

It will be noted that in those cases the taxpayers were legatees, whereas here the taxpayer is the donee of the widow who took against the will, and some distinction may be made on this basis. The court below stated that "no precedent or principle is involved" and limited its opinion to an approval of the Board's action. But the broad principle presented in this case, as well as in those cases decided by the Circuit Court of Appeals for the First Circuit, is whether personal property of a decedent passing otherwise than by specific bequest may be considered to have been held by the

recipient under the provisions of Section 101 (c) (8) of the Revenue Act of 1928, *infra*, during any period prior to actual distribution. Here the petitioner to succeed must either show that she should be deemed to have held the stock in question from the date of the gift rather than the date of distribution; or, upon the theory that she received title through her donor and is entitled to include the donor's holding period under Section 101 (c) (8)(B) of the Act, *infra*, she must show that the donor held the property from the date of the decedent's death. So viewed, the decision denying the use of the capital gain rate conflicts in principle with the decisions of the First Circuit in the cases of *The First National Bank of Boston* v. *United States*, and *Lee* v. *Commissioner*, *supra*. The broad question presented is one of considerable importance. In *Dibblee* v. *Commissioner*, 75 F. (2d) 617, the Circuit Court of Appeals for the Ninth Circuit decided the question contrary to the decisions in the First Circuit cases, *supra*, but that case is now pending on the taxpayer's petition for rehearing. The question is also involved in cases now pending on petition for review in the Circuit Courts of Appeals for the Second[1] and the Eighth Circuits.

As heretofore stated, the Government intends to apply to this Court for writs of certiorari to the First Circuit in the cases of *The First National Bank of Boston* v. *United States*, and *Lee* v. *Commissioner*, *supra*, and therefore does not oppose

[1]The case pending in the Second Circuit, Ogle v. Commissioner, was decided by that court on May 6, 1935, in favor of the Government. That court in its opinion recognizes a conflict betw

this petition. It respectfully requests that this Court withhold action upon the petition in this case until petitions in those cases may be prepared and filed.

Respectfully submitted.

STANLEY REED,
*Solicitor General.*

MAY 1935.

# APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791, 311, 818:

SEC. 101. CAPITAL NET GAINS AND LOSSES.

(a) *Tax in case of capital net gain.*—In the case of any taxpayer, other than a corporation, who for any taxable year derives a capital net gain (as hereinafter defined in this section), there shall, at the election of the taxpayer, be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted and the total tax shall be this amount plus 12½ per centum of the capital net gain.

* * * * *

(c) *Definitions.*—For the purposes of this title—

(1) "Capital gain" means taxable gain from the sale or exchange of capital assets consummated after December 31, 1921.

* * * * *

(8) "Capital assets" means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the

close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. For the purposes of this definition—

* * * * *

(B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

SEC. 113. BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * *

(2) *Gift after December 31, 1920.*—If the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift. * * *

* * * * *

(5) *Property transmitted at death.*—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the

basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. * * *

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